IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:02.07.2007

CORAM:

THE HONOURABLE MR. JUSTICE V. DHANAPALAN

W.P. Nos.20212 & 20213, 20259, 20346, 20266, 21026 of 2007
&
M.P. Nos.1,1,1,1,2,2,2,2,3 to 11 of 2007

W.P. Nos.20212 & 20213 of 2007

Consortium of Self Financing Professional,
Arts & Science Colleges, Tamil Nadu
represented by its Secretary
Dr. P. Selvaraj
12, Ganapathy Street
Royapettah, Chennai - 600 104 Petitioner in WP No.20212/07

Sakthi Mariamman Engineering College
represented by its Chairman
Mr. K.N. Ramachandran
55, Narayanaswamy Nagar
Thandalam, Chennai - 602 105 Petitioner in WP No.20213/07

vs.

1 The State of Tamil Nadu
represented by its Secretary to Government
Higher Education Department
Secretariat, Chennai - 600 009

2 The Director of Technical Education
Chennai - 600 025 Respondents in WP Nos. 20212 & 20213 of 2007

W.P. No.20259 of 2007

All India Islamic Foundation
represented by its Joint Secretary
Seethakathi Chambers
Old No.688, New No.272
Anna Salai, Chennai - 600 006 Petitioner

vs.

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1 The State of Tamil Nadu
represented by its
Secretary to Government
Law Department
Secretariat, Chennai - 600 009

2 The State of Tamil Nadu
represented by its
Secretary to Government
Higher Education Department
Secretariat, Chennai - 600 009

3 The Director of Technical Education
Chennai - 600 025

4 Anna University
represented by its Registrar
Sardar Patel Road
Guindy, Chennai - 600 025 Respondents

W.P. No.20346 of 2007

Sri Nandhanam College of Engineering
and Technology
represented by its Secretary
Molakarampatti Village
Thirupathur, Vellore District Petitioner

vs.

1 The State of Tamil Nadu
represented by its Secretary to Government
Higher Education Department
Secretariat, Chennai - 600 009

2 Anna University
represented by its Registrar
Sardar Patel Road
Guindy, Chennai - 600 025 Respondents

W.P. No.20266 of 2007

Madha Engineering College
represented by its Chairman
Kunrathur, Chennai Petitioner

vs.

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1 The State of Tamil Nadu
represented by its Secretary to Government
Higher Education Department
Secretariat, Chennai - 600 009

2 The Director of Technical Education
Chennai - 600 025 Respondents

W.P. No.21026 of 2007

Dr. Rajah Muthiah Chettiar
Charitable and Educational Trust
represented by its Trustee K. Chidambaram
Rani Seethai Hall V Floor
603, Anna Salai, Chennai - 600 002 Petitioner

vs.

1 State of Tamil Nadu
represented by the Secretary to Government
Health & Family Welfare Department
Secretariat, Fort St. George, Chennai - 600 009
2 The Director of Medical Educational
Kilpauk, Chennai - 600 009

3 The Selection Committee
Directorate of Medical Education
Kilpauk, Chennai - 600 010
represented by the
Additional Director of Medical Education Respondents

Common Prayer in W.P. Nos.20212 & 20213, 20259, 20346 and 20266/2007

Writ Petitions filed under Article 226 of the Constitution of India for issuance of a writ of declaration declaring the provisions contained in Sections 2(c)(iii), 4(1) and 5(4) of the Tamil Nadu Admission in Professional Educational Institutions Act 2006 (Tamil Nadu Act 3 of 2007) and also the consequential Government Order issued in G.O. Ms.No.115, Higher Education (J2) Department dated 25.05.2007 insofar as it provides admission of students through single window system as unconstitutional.

Prayer in W.P. No.21026 of 2007

Writ Petition filed under Article 226 of the Constitution of India praying for a writ of declaration declaring that Section 2(c)(iii), 4(1) and 5(4) of the Tamil Nadu Admission in Professional Educational Institutions Act, 2006 (Act 3 of 2007) and the consequent G.O. Ms.No.87,

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Health and Family Welfare Department dated 16.03.2007 insofar as it takes away the petitioner's right of admission in respect of 65% of the seats in MBBS course in its institution and also insofar as it provides for admission of students to the balance 35% of the seats through a centralised counselling is unconstitutional and violative of the law laid down by the Supreme Court.

For petitioner in W.P. Nos.20346 & 20259 of 2007	Mr. R. Krishnamurthy, Sr. Counsel for Mr. V. Ayyadurai
For petitioner in W.P. No.20212 of 2007	Mr. Rajeev Dhavan, Sr. Counsel for Mr. R. Natarajan
For petitioner in W.P. No.20213 of 2007	Mr. N.R. Chandran, Sr. Counsel for Mr. R. Natarajan
For petitioner in W.P. No.20266 of 2007	Mr. R. Muthukumaraswamy Senior Counsel for Mr. R. Natarajan
For petitioner in W.P. No.21026 of 2007	Mr. Satish Parasaran
For petitioners in M.P. Nos.3 to 11 in W.P. No.20212 of 2007	Mr. R. Shanmugasundaram for Mr. U. Karunakaran
For respondents in all writ petitions	Mr. R. Vidudalai Advocate General for Tamil Nadu assisted by Mr. M. Sekar, Special Govt. Pleader (Education)

COMMON ORDER

Since the issue involved in this batch of six writ petitions is one and the same, these writ petitions are decided by a common order.

2 What are challenged by the un-aided minority and non-minority professional colleges and the Consortium of Self Financing Professional, Arts & Science Colleges, in this batch of six writ petitions, are, Sections 2(c)(iii), 4(1) and 5(4) of the Tamil Nadu Admission in Professional Educational Institutions Act, 2006 (Act No.3 of 2007) ("the Act" for short) and the consequential Government Order Nos.115 and 87 dated 25.05.2007 and 16.03.2007 respectively insofar as the former one provideing for admission of students through single window system in case of five writ petitions and the latter one, in W.P. No. 21026 of 2007. taking away the petitioner's right of admission in respect of 65% of the seats in M.B.B.S. course in its institution and also insofar as providing for admission of students to the balance 35% of the seats through a centralised counselling.

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3 The common and main ground of attack in this batch of writ petitions is that Sections 2(c)(iii), 4(1) and 5(4) of the Act are in violation of the rights guaranteed under Article 19(1)(g) of the Constitution of India in respect of non-minority educational institutions and Article 30 in respect of minority educational institutions.

4 The brief facts leading to the filing of these writ petitions are as below:

i From the year 1993-94 and upto the year 2002-2003, admissions to self-financing Engineering Colleges were made on the basis of the scheme framed by the Supreme Court in its judgment reported in (1993) 4 SCC 111 in the matter of Unni Krishnan vs. State of Andhra Pradesh (in short "Unni Krishnan case"). Subsequently, the correctness of the Supreme Court's verdict in the said Unni Krishnan case, in respect of rights of minorities to establish and administer educational institutions and the rights of the non-minority un-aided institutions to administer their institutions and further, several issues fell for consideration of the Supreme Court in the case of T.M.A. Pai Foundation vs. State of Karnataka (in short "Pai Foundation case") before a 11 Judge Bench, the judgment of which is reported in (2002) 8 SCC 481 wherein it was ruled that the decision in Unni Krishnan case insofar as it framed the scheme regarding admission and fixation of fee was incorrect. In the result, the decision rendered in Unni Krishnan case and consequential directions issued by various authorities were over-ruled. In its judgment in the Pai Foundation case delivered on 31.10.2002, the Supreme Court held that the minorities as well as non-minorities had the right to establish and administer educational institutions in relation to the right guaranteed under Articles 30, 19 and 26 of the Constitution of India and that the said right to establish and administer comprises (i) right to admit students, (ii) right to set up a reasonable fee structure, (iii) right to constitute a governing body, (iv) to appoint staff and (v) and to take action if there is dereliction of duty on the part of the employee. In addition, the Supreme Court did not fail to recognise the autonomy of the unaided private institutions in the matter of governing admissions and further held that such institutions cannot be deprived of their right to select students, subject to adhering to the merit-based selection.

ii As there were different statutes and regulations by the State and Central Government and some of the educational institutions understood the majority judgment of the Pai Foundation case in different perspectives and further, since the courts were passing interim orders in a number of litigations, these orders were taken before the Supreme Court which referred all these matters to a Constitution Bench so as to clarify the doubts and anomaly, if any, arising out of the judgment in Pai Foundation case. Thus, a batch of cases known as Islamic Academy of Education vs. State of Karnataka was

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taken up to the Supreme Court and the Constitution Bench of the Supreme Court sought to clarify the judgment in Pai Foundation case under four important questions, which are as under:

"a. whether educational institutions are entitled to fix their own fee structure?

b. whether the minority and non-minority educational institutions stand on the same footing and have the same rights?

c. whether the private unaided professional colleges are entitled to fill in their seats to the extent of 100% and, if not, to what extent? and

d. whether private unaided professional colleges are entitled to admit students by evolving their own method of admission?"

iii As seen from the above, Question Nos.1 and 2 relate to fixation of fee structure and the rights of minority and non-minority educational institutions. Certain private un-aided professional colleges contended before the Supreme Court that they were entitled to fill up all the seats by themselves, evolving their own method of admission while the respondents/State Governments contended that the judgment in Pai Foundation case enabled them to fill up a percentage of the seats in private institutions and that the admission of students under the Management quota should be based on merit through a Common Entrance Test conducted by them. These issues were covered by Question Nos.3 and 4 raised in Islamic Academy case and it was answered by the Supreme Court that the Government was entitled to fill up a certain percentage of seats in the private un-aided professional colleges which would vary from State to State, depending upon the exigencies and that different percentages can be fixed for minority institutions and that the Managements were entitled to fill up only the remaining seats. It was further held that the Management of both minority and non-minority professional colleges can admit students in the quota allotted to them either on the basis of the Common Entrance Test conducted by the State or on the basis of a Common Entrance Test conducted by an Association of all Colleges of a particular type in that State, namely Medical, Engineering, etc. The Supreme Court further went on to hold that after the declaration of results in the Common Entrance Test, the merit list would be placed on the notice-board of all the Colleges and selection of students by the respective Colleges be made strictly on the basis of merit. As for the minority institutions, it was held by the Supreme Court that they will be entitled to fill up their quota with their own students on the basis of inter se merit among those students. This list of students so admitted was directed to be communicated to the authorities concerned. Also, there was a direction by the Supreme Court to the State Governments to appoint a permanent committee to

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ensure that the test conducted by the association of colleges is fair and transparent.

iv Pursuant to the judgment of the Supreme Court in Islamic Academy case, the Government of Tamil Nadu issued orders fixing 50% of seats in non-minority engineering colleges to be filled in by it through the Common Entrance Test conducted by it and permitting the private self-financing non-minority institutions to fill up the remaining 50% of the seats. In minority institutions, 30% of the seats was to be filled up by the State as above leaving the minority institutions to fill up the remaining 70% seats and both minority and non-minority institutions were permitted to conduct a common entrance examination through the petitioner consortium and they were also permitted to admit students pertaining to Management quota based on the merit resulting from the entrance examination and marks obtained in the qualifying examinations.

v In deference to the judgment of the Supreme Court, a permanent Committee was appointed with a retired Madras High Court Judge as its Head and in the academic year 2004-2005, the petitioner consortium sought permission to conduct Common Entrance Test for admission of students. The Committee, on 01.06.2004, granted permission to the petitioner consortium, imposing various conditions which were contrary to the judgment of the Supreme Court. One such condition was that the private self-financing institutions should admit students under the Management quota through single window system and this condition was challenged before a Division Bench of this Court which gave two differing views and ultimately, when the matter was referred to a third Judge, it was held by the third Judge that the direction of the Committee to the private self-financing institutions to follow the single window system to admit students under the Management quota was illegal. A Special Leave Petition has been filed by the State against the said judgment of the third Judge and the same is pending before the Supreme Court.

vi Meanwhile, several petitions came to be filed in various courts across the country raising several issues which were not resolved in Pai Foundation case as also the contentions to the effect that the judgment in Islamic Academy case was contrary to the judgment in Pai Foundation case. The said matters were referred to a 7 Judge Bench of the Supreme Court which rendered its judgment reported in (2005) 6 SCC 537 in the matter of P.A. Inamdar & others vs. State of Maharashtra. The said 7 Judge Bench, on consideration of four important issues posed before it, held that the States have no power to insist on seat sharing in un-aided private professional institutions by fixing a quota of seats between the Management and State. While reiterating the decision of the Pai Foundation case, the Supreme Court held that neither in the judgment in the Pai Foundation case nor in the decision in Kerala Education Bill, there is anything

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which would allow the State to regulate or control admissions in un-aided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State. Accordingly, the Supreme Court was of the view that such sharing would amount to nationalisation of seats which was specifically dis-approved in Pai Foundation case. It was further held by the Supreme Court that such imposition of quota or enforcing reservation policy of the available seats in un-aided professional colleges is an act constituting encroachments on the right of the private institutions which cannot be held to be regulatory within the meaning of Article 19(6) of the Constitution of India.

vii Therefore, in the Inamdar case, the Supreme Court held that they are unable to approve the scheme evolved in Islamic Academy case to the extent that it allows the State to fix quota for seat sharing between the Management and the State on the basis of local needs of each State in un-aided institutions of both minority and non-minority categories and that part of the judgment in Islamic Academy case was declared as not laying down the correct law and running counter to the judgment rendered in Pai Foundation case. The Supreme Court also clarified that paragraph 68 of the majority opinion in Pai Foundation case could be construed only to mean that unaided institutions could voluntarily agree for seat sharing with the State Government and not otherwise. It was further held that the State could not take over or fill up any percentage of seats under State quota unless the institutions themselves voluntarily give up any part of the seats to the Government to be filled up by it. This ruling was delivered by the Supreme Court on 12.08.2005 by which time, admissions had already been made following the principle laid down by the Supreme Court in Islamic Academy case and hence, the Supreme Court, while delivering the judgment in Inamdar case, held that the said judgment shall not affect or disturb admissions already made.

viii In terms of the ruling of the Supreme Court in Inamdar case, the private self-financing professional colleges were entitled to admit students in their institutions on their own without the Government claiming any quota of the seats available with them. When there was a request by the petitioner Consortium to conduct Common Entrance Test, the Permanent Committee passed an order on 09.05.2006 with several directions, one of which stipulated that admissions are to be made only on the basis of a rank list prepared by a centralised counselling following single window system and also to follow the rule of reservation by the non-minority private engineering colleges. This direction was challenged by the petitioner Consortium and private institutions as well. During the pendency of these matters before the Supreme Court, a consensus was arrived at between the Government and the petitioner Consortium in the matter of admissions for the year 2006-2007. In view of the said consensus, an affidavit was filed before this Court whereby and whereunder the petitioner Consortium

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agreed for seat-sharing between the Government and the private self-financing institutions for the academic year 2006-2007. It was further agreed that in respect of non-minority colleges, 65% of the seats in their institutions could be filled by the Government while the remaining 35% could be filled by the respective colleges. It was also agreed that as for minority colleges, 50% of the seats could be filled by the Government while the remaining 50% could be filled by the respective Colleges and 15% of the seats within the Management quota was permitted to be filled up with non-resident Indians (NRIs). The admissions were agreed to be made based on the marks obtained in the Common Entrance Test conducted by the petitioner Consortium taken along with the marks scored in the qualifying examinations. The State Government also filed an affidavit consenting to follow the practice which was adopted for the previous academic year in the matter of admission of students by private colleges and making it clear that they do not insist that the self-financing colleges should follow the single window system. These agreements were taken on record and in terms of the settlement arrived at between the parties, the writ petitions were disposed of by this Court vide its judgment reported in 2006 (3) MLJ 648. This Court, thus, while doing so, by recording the affidavit and issuing directions thereof, observed that its directions, though based on consensus reached between the parties, were nevertheless in conformity with the principles enunciated by the Supreme Court.

ix In the academic year 2006-2007, the private self-financing Engineering Colleges, both minority as well as non-minority, had agreed to share the seats with the Government only for the academic year 2006-2007 and accordingly, filled up the seats in terms of the consensus arrived at and this being the scenario, the State has now enacted the Act to provide for admissions to professional degree courses such as engineering, medicine, dental, agriculture, etc. on the basis of marks scored in the qualifying examinations. In the said Act, the Common Entrance Test which was one of the basis of selection of students for admission to professional institutions has been done away with and admissions to every Government seat in every professional educational institution as well as admissions to seats to be filled up by the Management in professional educational institutions were to be done only on the basis of the marks obtained by the students in the relevant subjects in the qualifying examinations.

5 The main grounds of attack in this batch of writ petitions are that:

a. as per the judgment of the Supreme Court in Inamdar case, the Government have no right either to appropriate any quota of seats or to compel the unaided professional institutions to give up a share of the available seats to the candidates chosen by the State;

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b. the consensus arrived at between the Government and the private engineering colleges during the year 2006 was specifically for the academic year 2006-2007 and as such, the reference in Section 2(c)(iii) of the Act to the consensus is a mis-conception and a non-existing fact;

c. Section 4(1) of the Act directing admission in unaided private educational institutions to be made on the basis of the marks obtained in the qualifying examinations, is violative of Article 30(1) in the case of minorities and Articles 19(1)(g) and 26 in case of non-minorities since the right of the unaided private educational institutions to admit students has been traced to the provisions of the Constitution and as such, the State have no jurisdiction to interfere with the said right, as held by the Supreme Court in Pai Foundation case and clarified in Inamdar case;

d. Section 5(4) of the Act insofar as directing the unaided professional institutions to admit students through centralized counselling is opposed to the judgment of this Court reported in (2004) 4 MLJ 1 in and by which it was held that the direction of the permanent committee to private self-financing institutions to admit students under the Management quota through a single window system, is illegal; and

e. since the process of Common Entrance Test has been done away with in view of Sections 3 and 4 of the Act, the question of centralized counselling would only be a misnomer besides constituting serious inroad into the rights of private self-financing professional colleges in the matter of admission.

6 On the other hand, the respondent State has filed its counter and it is contended that the order of a learned Single Judge of this Court, passed in a batch of writ petitions with regard to engineering admissions for the year 2004-2005, dispensing with the single window system for selection of candidates to management quota was referred to a Division Bench and in view of divergent views of the Bench expressed in the order dated 25.08.2004, when the matter was referred to a third Judge, the third Judge confirmed the finding of one of the Judges of the Bench that the individual institutions shall have their own counselling and the order dated 25.08.2004 has been taken on appeal in S.L.P. before the Supreme Court and the same is pending for final adjudication and as such, the order dated 25.08.2004 of this Court is not final and conclusive, more particularly when the Supreme Court, in paragraphs 133 and 135 of its judgment in Inamdar case, has stood by centralized counselling taking into account the larger interest and welfare of the student community.

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7 In response to the case of the petitioners that the consensus arrived at between the Consortium and the Government in respect of seat sharing is only for the academic year 2006-2007, it is contended by the State that when the Consortium did not protest at the time of passing of the Bill in theAssembly in December 2006 after the assent by the President of India, the petitioners are now estopped from challenging Section 2(c)(iii) of the Act. In this context, it is further submitted by the State that seat-sharing cannot be reviewed every year unless there is a material change warranting modification of the terms of agreement.

8 As far as the case of the petitioners that Section 4(1) of the Act compels the rule of reservation to be followed by minority institutions, it is submitted by the respondent State that since Section 6 of the Act is clear to the effect that admission into every professional educational institution other than minority professional educational institutions shall be made following the reservation as per law in force, it is incorrect on the part of the petitioners to say that the minority institutions are compelled to make the admissions following the rule of reservation. Pointing out that the number of applications has increased to 95,181 this year when compared to 66,384 applications received for the year 2006-2007, it is contended by the State that the present Act had received overwhelming response from the student community and as such, the selection process which is already in its mid way does not warrant to be stalled.

9 Before proceeding further, it would be relevant to refer to the impugned provisions of the Act which read as under:

2 In this Act, unless the context otherwise requires:-
(c)"Government seats" mean-

(iii) 65% of seats in each branch in non-minority unaided professional educational institutions and 50% of the seats in each branch in minority unaided professional educational institutions, in accordance with the consensus arrived at between such professional educational institutions and the Government;

4 Admission in unaided professional educational institutions

(1) Notwithstanding anything contained in any relevant law or any rules, regulations or by laws made thereunder, admission to seats, excluding the seats referred to in item (iii) of clause (c) of Section 2 in all unaided professional educational institutions shall be made by the consortium of unaided professional educational institutions approved by the Government or by any authority authorised by the Government, on the basis of the marks obtained by a student in the relevant subjects in the qualifying examination.

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5 Normalization of marks:

(4) The appropriate authority and the consortium of unaided professional educational institution shall prepare the rank lists for admission of students to the seats referred to in section 3 and section 4, respectively and allot students through centralised counselling.

10 Mr. R. Krishnamurthy, learned Senior Counsel appearing for the petitioners in W.P. Nos.20259 & 20346 of 2007, in his first limb of submissions, has contended that:

a. the impugned provisions in the Act viz., 2(c)(iii), 4(1) and 5(4) take away the rights guaranteed under the Constitution and also run contrary to the judgments of the Supreme Court in Pai Foundation case and Inamdar case;

b. the Act does not state the method of admission in respect of self-financing Colleges which are not members of the Consortium and therefore, the Act is an exercise in futility;

c. the method of assigning random number in the event of equal marks scored by students is irrational;

d. pursuant to the ruling of the Supreme Court in Pai Foundation case and Inamdar case, there is no power vested with the Government to have a quota in seats or centralised counselling and to insist upon single window system in self-financing Colleges and therefore, the Government cannot insist on communal reservation in respect of Management seats in these colleges or to say in other words, the respondent-State has re-introduced the ruling of the Supreme Court in Unnikrishnan case in the form of the impugned legislation and as such, the impugned legislation is invalid and unconstitutional.

11 Secondly, Mr. R. Krishnamurthy, learned Senior Counsel has contended that:

a. the consensual arrangement made for the year 2006-2007 is confined to the academic year 2006-2007 only and this arrangement cannot be altered by a unilateral re-writing of the contract as this arrangement has inter-alia contained seat-sharing, quota and single window system for that period alone and there cannot be a tacit consent and therefore, that consensual arrangement cannot be relied upon and given effect to the legislation unilaterally;

b. the abolition of Common Entrance Test is a material change and in view of this aspect also, the consensual arrangement comes to an end and even from the recorded proceedings before this Court in the

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judgment reported in (2006) 3 MLJ 648, it is made clear that this arrangement was for the year 2006-2007 and it cannot have effect for the unilateral contract which has been incorporated in Section 2(c)(iii) of the impugned Act;

12 Thirdly, the learned Senior Counsel has vehemently argued that:

a the statement of objects and reasons of the impugned Act does not make any mention regarding seat-sharing and there is no mention about the percentage of seat-sharing whereas the objects and reasons of the Act go around mainly on the need for elimination of Common Entrance Test in the interest of social justice and proclamation of vulnerable student population and perhaps to normalise the process for ensuring equality of opportunity for admission to the students from different Boards and hence, the impugned Act cannot be held as a constitutionally valid one as it suffers from illegality contrary to the principles laid down by the Supreme Court.

b the legislative facts are subject to judicial scrutiny and there has been incorrect legislative fact based on which the impugned Act has been enacted taking away the rights of the minority and non-minority educational institutions and is also against the legal dictum profounded by the Supreme Court in Pai Foundation case and Inamdar case.

c the Act impugned in this batch of writ petitions takes away the control and management of the private unaided minority and non-minority educational colleges in the matter of admission to seats which is subject to the approval of the Government or the authority authorised by the Government on the basis of marks obtained by the student in the relevant subject in the qualifying examination and therefore, the admission procedure contemplated under Section 4(1) of the Act has to be declared unconstitutional;

d by using the words "appropriate authority" in the Act, the Government cannot involve itself in the admission procedure of the petitioner institutions and as far as the phrase "appropriate authority" is concerned, it is the Government under Section 3 of the Act and under Section 4 of the Act, the authority authorised by the Government is only the petitioner consortium and this is the manner in which the phrase has to be interpreted and not otherwise and in view of this, the Act has to be declared unconstitutional;

e the impugned Act affects the doctrine of reasonableness as there is no rationale or nexus for seat-sharing in the ratio 65%-35% in the case of non-minority institutions and 50%-50% in case of minority institutions;

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f the Act under challenge cannot be saved by applying the doctrine of severability as the other provisions in the Act cannot stand independently and further, the Act suffers from the doctrine of colourable exercise of power and therefore, the impugned Act is inconsistent with the law laid down by the Supreme Court in its judgment in St. Stephen's College vs. University of Delhi and also the doctrine of "reading down" cannot be resorted to in this case since words cannot be "substituted" or "added".

13 Mr. Rajeev Dhavan, learned Senior Counsel appearing for the petitioner in W.P. No.20212 of 2007, has contended that:

a. the Pai Foundation case decided by a 11 Judge Bench of the Supreme Court has become the law of the land and it is the law declared by the Supreme Court particularly in view of the fact that ruling of the Supreme Court in Inamdar case, has reiterated the position in Pai Foundation case;

b. the impugned provisions of the Act are totally against the constitutional rights of the unaided minority and non-minority educational institutions with regard to their power to control and administer the institutions;

c. the impugned Act not only infringes the fundamental rights of the petitioner Consortium and other colleges guaranteed under Articles 19(1)(g) and 30 of the Constitution but also violates the fundamental principles laid down in Pai Foundation case and Inamdar case;

d. even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole;

e. in determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor and the test to be applied is whether the legislature would have enacted the valid part, if it had known that the rest of the statue was invalid;

f. to give a proper understanding to an Act, the intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said and a proper construction requires and as a consequence, a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless, has to be avoided.

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g. The impugned Act which has been passed based on incorrect legislative fact has to be struck down;

14 By taking me through the judgment of the Supreme Court in Inamdar case, Mr. Rajeev Dhavan, learned Senior Counsel, has argued that the State cannot insist on private educational institutions which do not receive any aid from the State to implement the State's policy on reservation for granting admission on lesser percentage of marks i.e. on any criterion except merit and if the State is allowed to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, it would amount to nationalisation of seats which has been specifically disapproved in Pai Foundation case. He has further contended that such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions and such acts would only mean violation of Article 30(1) of the Constitution of India.

15 On the aspect of reasonableness, Mr. Rajeev Dhavan, learned Senior Counsel has contended that, for a constitutional principle to qualify as an essential feature, it must be established that the principles of federalism, secularism, reasonableness and social justice are beyond the words of a particular provision and are a part of Constitutional law binding on the Legislature and therefore, the principles stated above are overarching principles which provide a linking factor for principle of fundamental rights like Articles 14, 19 and 21 of the Constitution and these principles are beyond the amending power of Parliament.

16 The learned Senior Counsel has also drawn the attention of this Court to a recent decision judgment of the Supreme Court in the matter of M. Nagaraj & Others vs. Union of India reported in 2006 (8) SCC 212 the relevant portion of which reads as under:

> ". . .The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in A.K. Gopalan and held in its landmark judgment in Maneka Gandhi v. Union of India that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right.. . ."

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17 Mr. Rajeev Dhavan, by referring to the judgment of the Supreme Court reported in (2004) 2 SCC 130 in the case of Teri Oats Estates Limited v. Union Territory of Chandigarh, has contended that by proportionality, it is meant that the question, whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures, has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be and under the principle, the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons, keeping in mind the purpose which they were intended to serve. In this context, it is his further submission that ever since 1952, the principle of proportionality has been applied vigorously to legislative and administrative action in India and while dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, the Supreme Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. It is his argument that in such cases, the action has to be tested on the principle of proportionality in the case of a legislation.

18 As regards the illegality and unconstitutionality of the method of admission, the learned Senior Counsel has contended that there is no power in the Government to have quota in seats or to insist upon single window system and communal reservation in self-financing colleges and as such, the impugned Act is a classic example of the doctrine of colourable exercise of power. He has further argued that there should be legislative competency on the one side and fundamental rights have to be taken care of on the other side and the legislation cannot ignore the law laid down by the Supreme Court in Inamdar case and if the legislation is contrary, then it is subject to judicial review.

19 On the aspect of interpretation of "appropriate authority", Mr. Rajeev Dhavan, learned Senior Counsel has contended that the appropriate authority is the authority of the Government under Section 3 of the Act and the authority authorised by the Government under Section 4 of the Act is none other than the petitioner Consortium and the Act should be understood in that manner, as otherwise the contextual connotation and the scheme of the Act will run contrary to the object sought to be achieved in the light of the rights of the petitioner institutions. In support of his contention as to how the words used in a statute have to be interpreted, reliance has been placed by the learned Senior Counsel on a judgment of the Supreme Court reported in (1994) 2 SCC 434 in the case of Printers (Mysore) Ltd. And another vs. Assistant Commercial Tax Officer and others (para 18)

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"18. Now, coming back to the amendment of the definition of "goods" in Section 2(d) of the Central Sales Tax Act, the said amendment, brought in with a view to bring the said definition in accord with the amendments brought in by the Constitution Sixth (Amendment) Act (referred to hereinbefore) was actuated by the very same concern, viz., to exempt the sale of newspapers from the levy of Central Sales Tax. The amendment was not intended to create a burden which was not there but to remove the burden if any already existing on the newspapers - a policy evidenced by the enactment of the Taxes on Newspapers - (Sales and Advertisements) Repeal Act, 1951. This concern must have to be borne in mind while understanding Section 8 (3)(b). Now, the expression "goods" occurs on four occasions in Section 8(3)(b). On first three occasions, there is no doubt, it has to be understood in the sense it is defined in clause (d) of Section 2. Indeed, when Section 8(1)(b) speaks of goods, it is really referring to goods referred to in the first half of Section 8(3)(b), i.e. on first three occasions. It is only when Section 8(3)(b) uses the expression "goods" in the second half of the clause, i.e. on the fourth occasion that it does not and cannot be understood in the sense it is defined in Section 2(d). In other words, the "goods" referred in the first half of clause (b) in Section 8(3) refers to what may generally be referred to as raw material (in cases where they were purchased by a dealer for use in the manufacture of goods for sale) while the said word "goods" occurring for the fourth time (i.e. in the latter half) cannot obviously refer to raw material. It refers to manufactured "goods", i.e. goods manufactured by such purchasing dealer - in this case, newspapers. If we attach the defined meaning to "goods" in the second half of Section 8(3)(b), it would place the newspapers in a more unfavourable position than they were prior to the amendment of the definition in Section 2(d). It should also be remembered that Section 2 which defines certain expressions occurring in the Act opens with the words: "In this Act, unless the context otherwise requires". This shows that wherever the word "goods" occurs in the enactment, it is not mandatory that one should mechanically attribute to the said expression the meaning assigned to it in clause (d). Ordinarily, that is so. But where the context does not permit or where the context requires otherwise, the meaning assigned to it in the said

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definition need not be applied. If we keep the above consideration in mind, it would be evident that the expression "goods" occurring in the second half of Section 8(3)(b) cannot be taken to exclude newspapers from its purview. The context does not permit it. It could never have been included by Parliament. Before the said amendment, the position was - the State could not levy tax on intra-State sale of newspapers; the Parliament could but it did not and Entry 92-A fo List I bars the Parliament from imposing tax on inter-State sale of newspapers; as a result of the above provisions, while the newspapers were not paying any tax on their sale, they were enjoying the benefit of Section 8(3)(b) read with Section 8(1)(b) and paying tax only @ 4% on non-declared goods which they required for printing and publishing newspapers. Their position could not be worse after the amendment which would be the case if we accept the contention of the Revenue. If the contention of the Revenue is accepted, the newspapers would now become liable to pay tax @ 10% on non-declared goods as prescribed in Section 8(2). This would be the necessary consequence fo the acceptance of Revenue's submission inasmuch as the newspapers would be deprived of the benefit of Section 8(3)(b) rad with Section 8(1)(b). We do not think that such was the intention behind the amendment of definition of the expression "goods" by the 1958 (Amendment) Act. Even apart from the opening words in Section 2 referred to above, it is well settled that where the context does not permit or where it would lead to absurd or intended result, the definition of an expression need not be mechanically applied."

20 On his contention that no mala fide can be attributed against Legislature, Mr. Rajeev Dhavan has relied on a judgment of the Supreme Court reported (2000) 1 SCC 168 in the matter of Indra Sawhney vs. Union of India and others (paras 35 to 37)

"35 Before we go into the validity of clauses (a) and (b) of Section 3, it is necessary to find out if the legislative declaration of "known facts" in Section 3 of the Act is amenable to judicial scrutiny.

It is now fairly well settled that legislative declarations of facts are not beyond judicial scrutiny in the constitutional context of Articles 14 and 16. In Kesavananda Bharati vs. State of Kerala, the question arose - in the context of legislative declarations made for purposes of Article 31-C - whether the court was precluded from lifting the veil,

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examining the facts and holding such legislative declarations as invalid. The said issue was dealt with in various judgments in that case, e.g. Judgments of Ray., J (as he then was), Palekar, Khanna, Mathew, Dwivedi, JJ and Beg, J. and Chandrachud J. (as they then were). The learned Judges held that the courts could lift the veil and examine the position in spite of a legislative declaration. Ray, J. (as he then was) observed:

> "The court can tear the veil to decide the real nature of the statute if the facts and circumstances warrant such a course.
>
> * * *
>
> A conclusive declaration would not be permissible so as to defeat a fundamental right."

Palekar, J. said that if the legislation was merely a pretence and the object was discrimination, the validity of the statute could be examined by the court notwithstanding the declaration made by the legislature and the learned Judge referred to Charles Russel v. R. and to Attorney General v. Queen Insurance Co. Khanna, J. held that the declaration could not preclude judicial scrutiny. Mathew, J. held that declarations were amenable to judicial scrutiny. If the law was passed only "ostensibly" but was in truth and substance, one for accomplishing an unauthorised object, the court, it was held, would be entitled to tear the veil. Beg, J. (as he then was) held that the declaration by the legislature would not preclude a judicial examination. Dwivedi J. said that the courts retain the power in spite of Article 31-C to determine the correctness of the declaration. Chandrachud J (as he then was) held that the declaration could not be utilised as a cloak to evade the law and the declaration could not preclude the jurisdiction of the courts to examine the facts.

37. This being the legal position, this Court could certainly examine whether the so-called "known facts" referred to in Section 3 were indeed non-existent."

21 Mr. N.R. Chandran, learned Senior Counsel appearing for the petitioner in W.P. No.20213 of 2007 has pointed out that the cause of action arises when the Act is enforced and in the case on hand, the Act has come into force from 07.03.2007 and therefore, the petitioner has now challenged the validity of the Act in respect of three of its Sections and

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the legislation will have prospective application and therefore, any consensus arrived at after the Act, is only in effect in the actual intention and on the contrary, the percentage fixed in the impugned Act in Section 2(c)(iii) is contrary to the legal proposition. In this regard, reliance has been placed by the learned Senior Counsel on a judgment of the Supreme Court reported in (2004) 6 SCC 254 in the matter of Kusum Ingots & Alloys Limited vs. Union of India and another (para 21)

> "A parliamentary legislation when it receives the assent of the President of India and is published in the Official Gazette, unless specifically excluded, will apply to the entire territory of India. If passing of a legislation gives rise to a cause of action, a writ petition questioning the constitutionality thereof can be filed in any High Court of the country. It is not so done because a cause of action will arise only when the provisions of the Act or some of them which were implemented shall give rise to civil or evil consequences to the petitioner. A writ court, it is well settled, would not determine a constitutional question in a vacuum."

22 The further submission made by the learned Senior Counsel is that the Government can exercise its power only when there is mal-practice, exploitation or lack of transparency on the part of the educational institutions and that the Government can only monitor the activities of the educational institutions but can never take over their management by compelling single window system in the admission procedure in violation of the proposition laid down by Pai Foundation case and Inamdar case and on this ground, the impugned Act is liable to be struck down.

23 Mr. R. Muthukumaraswamy, learned Senior Counsel appearing for the petitioner in W.P. No. 20266 of 2007 has contended that:

a. the centralized counselling will affect the rights of the institution and the impugned Government Order in G.O. Ms.115 dated 25.05.2007 is contrary to the law laid down by the Supreme Court in Pai Foundation case as well as Inamdar case;

b. since paragraph 68 of the Pai Foundation case has been reiterated in Inamdar case upholding the rights of minority educational institutions, the impugned legislation is contrary to the constitutional rights guaranteed under Articles 19(1)(g) and 30 of the Constitution of India;

24 Pointing out paras 124-126 of the Supreme Court judgment in Inamdar case, learned Senior Counsel has contended that though for the year 2006-2007, consensus has been arrived at and there is no appeal against and it had become final, that cannot be the consensus for the

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unilateral action of the Government to fix percentage of seat-sharing and therefore, this legislation which is colourable exercise of power is liable to be struck down as laid down by the Supreme Court in St. Stephen's College case which is a correct proposition in this regard. In this context, he has argued that Section 4(1) of the Act is equivalent to the circular impugned in St. Stephen's College case and when 4(1) is declared as unconstitutional, the impugned provision in Section 5(4) will go automatically. In support of his contention in this regard, reliance has been placed by him on a judgment of the Supreme Court reported in (1992) 1 SCC 558 in the matter of St. Stephen's College vs. University of Delhi (paras 60, 63 and 66)

> "60. The right to select students for admission is a part of administration. It is indeed an important facet of administration. This power also could be regulated but the regulation must be reasonable just like any other regulation. It should be conducive to the welfare of the minority institution or for the betterment of those who resort to it. The Bombay Government Order which prevented the schools using English as the medium of instruction from admitting students who have a mother tongue other than English was held to be invalid since it restricted the admission pattern of the schools. The Gujarat Government direction to the minority run College to reserve 80 per cent of seats for government selected candidates with a threat to withdraw the grant-in-aid and recognition was struck down as infringing the fundamental right guaranteed to minorities under Article 30(1) of the Constitution. In Rt. Rev. Magr. Mark Netto v. Government of Kerala the denial of permission to the management of a minority school to admit girl students was held to be bad. The Regional Deputy Director in that case refused to give sanction for admission of girl students on two grounds: (i) that the school was not opened as a mixed school and that the school has been run purely as a boys school for 25 years; and (ii) that there was facility for the education of girls of the locality in a nearby girls school which was established by the Muslims and was also a minority institution. This Court noted that the Christian community in the locality wanted their girls also to receive education in the school maintained specially by their own community. They did not think it in their interest to send their children to the Muslim girls school run by the other minority community. The withholding of permission for admission of girl students in the boys minority school was violative of Article 30(1). It was also observed that the rule

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sanctioning such refusal of permission crosses the barrier of regulatory measures and comes in the region of interference with the administration of the institution, a right which is guaranteed to the minority under Article 30(1). The Court restricted the operation of the rule and made it inapplicable to the minority educational institution. In Director of School Education, Government of T.N. v. Rev. Brother G. Arogiasamy, the Madras High Court had an occasion to consider the validity of an uniform procedure prescribed by the State Government for admission of candidates to the aided training schools. The government directed that the candidates should be selected by the school authorities by interviewing every candidate eligible for admission and assessing and awarding marks in the interview. The marks awarded to each candidate in the interview will be added to the marks secured by the candidate in the SSLC public examination. On the basis of the aggregate of marks in the SSLC examination and those obtained at the interview the selection was to be made without any further discretion. The High Court held that the method of selection placed serious restrictions on the freedom of the minority institution to admit their own students. It was found that the students of the minority community could not compete with the students belonging to other communities. The applications of students from other communities could not be restricted under law. The result was that the students of minority community for whose benefit the institution was founded, had little chance of getting admission. The High Court held that the Government Order prescribing the uniform method of selection could not be applied to minority institutions.

63. The oral interview as a supplementary test and not as exclusive test for assessing the suitability of candidates for college admission has been recognised by this Court. But, at the same time, to avoid arbitrariness in the selection it has been repeatedly held that there shall not be allocation of high percentage of marks for oral interview test. Where candidate's personality is yet to develop, it has been emphasised that greater weight has perforce to be given to performance in the written examination and the importance to be attached to the interview test must be minimal. The Court has generally indicated that interview marks should not be more than 15 per cent of the total marks.

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66. So in the end we are driven to conclude that St. Stephen's College is not bound by the impugned circulars of the University."

25 In support of his arguments, Mr. Muthukumaraswamy, learned Senior Counsel has placed further reliance on:

a. a judgment of the Supreme Court reported in (2005) 2 SCC 673 in the case of Central Board of Dawoodi Bohra Community and another vs. State of Maharasthra and another (paras 5 & 12)

"5. In Bharat Petroleum Corporation Ltd. Case the Constitution Bench has ruled that a decision of a Constitution Bench of this Court binds a Bench of two learned Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. At the most, they could have ordered that the matter be heard by a Bench of three learned Judges. Following this view of the law, what has been declared by this Court in Pradip Chandra Parija case clinches the issue. The facts in the case were that a Bench of two learned Judges expressed dissent with another judgment of three learned Judges and directed the matter to be placed before a larger Bench of five Judges. The Constitution Bench considered the rule of "judicial discipline and propriety" as also the theory of precedents and held that it is only a Bench of the same quorum which can question the correctness of the decision by another Bench of coordinate strength in which case the matter may be placed for consideration by a Bench of larger quorum. In other words, a Bench of a lesser quorum cannot express disagreement with, or question the correctness, of the view taken by a Bench of larger quorum. A view of the law taken by a Bench of three Judges is binding on a Bench of two Judges and in case the Bench of two Judges feels not inclined to follow the earlier three Judge Bench decision then it is not proper for it to disagree or dissent with the earlier view; but doubting the correctness of such earlier view, it can only request the Chief Justice for the matter being placed for hearing before a three-Judge Bench which may agree or disagree with the view of the law taken earlier by the three Judge Bench. As already noted, this view has been followed and reiterated by at least three subsequent Constitution Benches referred to hereinabove.

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12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:

> 1 The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.
>
> 2 A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted."

b. another judgment of the Supreme Court reported in AIR 1983 SC 239 in the matter of Sanjeev Coke Manufacturing Company vs. Bharat Coking Coal Ltd. and another (para 26)

> "Shri Ashok Sen drew pointed attention to the earlier affidavits filed on behalf of Bharat Coking Coal Company and commented severally on the alleged contradictory reasons given therein for the exclusion of certain coke oven plants from the Coking Coal Mines (Nationalisation) Act. But, in the ultimate analysis, we are not really to concern ourselves with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The deponents of the affidavits filed into Court may speak for the parties on whose behalf they swear to the statements. They do not speak for the Parliament and Parliament is never before the Court. After Parliament has said what it intends to say, only the Court may say

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what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court's is the only authentic voice which may echo (interpret) the Parliament. This the Court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the Court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of Parliamentary intention by the executive government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the Court may ultimately find and more especially by what may be gathered from what the legislature has itself said. We have mentioned the facts as found by us and we do not think that there has been any infringement of the right guaranteed by Art. 14."

26 It is to be noted in this context that all the four learned Senior Counsel have relied on the judgment of the Supreme Court in Pai Foundation case and the relevant paragraphs are as under:

"36. The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, inter alia, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfils the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution.

37 . . . When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission

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solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student.

38 The scheme in Unni Krishnan has the effect of nationalising education in respect of important features viz., the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme, the private institutions are indistinguishable from the government institutions; curtailing all these essential features of the right of administration of a private unaided educational institution can neither be called fair nor reasonable. Even in the decision in Unni Krishnan case, it has been observed by Jeevan Reddy, J. at p. 749, para 194, as follows:

> "194. The hard reality that emerges is that private educational institutions are a necessity in the present-day context. It is not possible to do without them because the governments are in no position to meet the demand – particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions – including minority educational institutions – too have a role to play."

40. Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness.

41. Surrendering the total process of selection to the State is unreasonable, as was sought to be done in Unni Krishnan scheme. Apart from the decision in St. Stephen's College v. University of Delhi which recognised and upheld the right of a minority aided

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institution to have a rational admission procedure of its own, earlier Constitution Bench decisions of this Court have, in effect, upheld such a right of an institution devising a rational manner of selecting and admitting students.

50. The right to establish and administer broadly comprises the following rights:

a. to admit students;
b. to set up a reasonable fee structure
c. to constitute a governing body
d. to appoint staff (teaching and non-teaching) and
e. to take action if there is dereliction of duty on the part of any employees.

59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that State-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But, by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference which, therefore, brings us back in a vicious circle to the original problem, viz. the lack

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of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be 'purchasable' is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations.

65 The reputation of an educational institution is established by the quality of its faculty and students and the educational and other facilities that the college has to offer. The private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies. It is for this reason that in St. Stephen's College case this Court upheld the scheme whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons.

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68 It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz., graduation and post-graduation non-professional colleges or institutes."

27 Apart from the above, the learned Senior Counsel appearing for the petitioners have also relied on the judgment of the Supreme Court in Inamdar case and the relevant paragraphs read as under:

"Minority unaided educational institutions asking for affiliation or recognition:

121 Affiliation or recognition by the State or the Board or the university competent to do so, cannot be denied solely on the ground that the institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing mal-administration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of

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infrastructure sufficient for its growth can be stipulated as a pre-requisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated.

122 Apart from the generalised position of law that the right to administer does not include the right to mal-administer, an additional source of power to regulate by enacting conditions accompanying affiliation or recognition exists. A balance has to be struck between the two objectives;; (i) that of ensuring the standard of excellence of the institution and (ii) that of preserving the right of the minority to establish and administer its educational institution. Subject to a reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the triple tests; (i) the test of reasonableness and rationality, (ii) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it,, and (iii) that there is no inroad into the protection conferred by Article 30(1) of the Constitution, that is, by framing the regulation the essential character of the institution being a minority educational institution, is not taken away.

124 So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of a difference between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat-sharing in unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement the State's policy on reservation for granting admission on lesser percentage of marks i.e. on any criterion except merit.

125 As per our understanding, neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala Education Bill which was approved by Pai Foundation, is there anything which would allow the State to regulate or control admissions

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in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in Pai Foundation. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

126 The observations in para 68 of the majority opinion in Pai Foundation on which the learned counsel for the parties have been much at variance in their submissions, according to us, are not to be read disjointly from other parts of the main judgment. A few observations contained in certain paragraphs of the judgment in Pai Foundation if read in isolation, appear conflicting or inconsistent with each other. But if the observations made and the conclusions derived are read as a whole, the judgment nowhere lays down that unaided private educational institutions of minorities and non-minorities can be forced to submit to seat-sharing and reservation policy of the State. Reading relevant parts of the judgment on which learned counsel have made comments and counter-comments and reading the whole judgment (in the light of previous judgments of this Court, which have been approved in Pai Foundation) in our considered opinion, observations in para 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on common entrance test of the State. There are also observations saying that they may frame

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their own policy to give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society.

127 Nowhere in Pai Foundation, either in the majority or in the minority opinion, have we found any justification for imposing seat-sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management seats.

128 We make it clear that the observations in Pai Foundation in para 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State.

129 In Pai Foundation, it has been very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees.

130 For the aforesaid reasons, we cannot approve of the scheme evolved in Islamic Academy to the extent it allows the States to fix quota for seat-sharing between the management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. That part of the judgment in Islamic Academy, in our considered opinion, does not lay down the correct law and runs counter to Pai Foundation.

132 Our answer to the first question is that neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent

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only and not in a manner and to such an extent that their minority educational institution status is lost. If they do so, they lose the protection of Article 30 (1).

Q.2 Admission procedure of unaided educational institutions

133 So far as the minority unaided institutions are concerned to admit students being one of the components of "the right to establish and administer an institution", the State cannot interfere therewith. Up to the level of undergraduate education, the minority unaided educational institutions enjoy total freedom.

134 However, different considerations would apply for graduate and postgraduate level of education, as also for technical and professional educational institutions. Such education cannot be imparted by any institution unless recognised by or affiliated with any competent authority created by law, such as a university, Board, Central or State Government or the like. Excellence in education and maintenance of high standards at this level are a must. To fulfil these objectives, the State can and rather must, in national interest, step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth.

136 Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. . . . Holding of such common entrance test followed by centralised counselling or, in other words, single-window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of the list of successful candidates prepared at CET without altering the order of merit inter se of the students so chosen.

137 Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefor subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a

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particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the abovesaid triple tests. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing mal-administration. The admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly.

138 It needs to be specifically stated that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb mal-practices, it would be permissible to regulate admissions by providing a centralised and single window procedure. Such a procedure, to a large extent, can secure grant of merit-based admissions on a transparent basis . . "

28 Mr. Satish Parasaran, learned counsel for the petitioner in W.P. No.21026 of 2007 which is a non-minority medical college, like the other Senior Counsel appearing for the petitioners, has challenged the three provisions of the Act and the consequential G.O. Ms.No.87 dated 16.03.2007 and contended that there is no consensus between the Management and the Government in seat-sharing and whatever the decision of the Supreme Court in respect of engineering colleges is equally applicable to the Medical Colleges also. He has adopted the arguments advanced by four Senior Counsel appearing for the other petitioners in assailing the impugned Act and has more particularly questioned the impugned Act insofar as it provides for centralised counselling which is affecting the petitioner institution. Lastly, he has contended that the fundamental rights guaranteed under Part III of the Constitution in protecting the interest of the unaided non-minority educational institutions is to be safeguarded and any legislation which infringes the fundamental rights guaranteed under the Constitution has to be struck down.

29 Rebutting the arguments advanced by the learned Senior Counsel appearing for the petitioners, Mr. R. Vidudalai, learned Advocate General, on behalf of the State, has contended that:

a. there is always a presumption in favour of constitutional validity of an enactment and the burden is upon the person who attacks it to show that there has been a clear transgression of constitutional principles;

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b. it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

c. in order to sustain the presumption of constitutionality, the Court may take into consideration matters of knowledge, matters of common report, history of the times and may assume every state of facts which can be conceived existing at the time of legislation, good faith and knowledge of the existing conditions on the part of legislation;

30 On the above aspect, the learned Advocate General has placed reliance on:

a. a judgment of the Supreme Court reported in (2005) 12 SCC 77 in the matter of State of Rajasthan and others vs. Basant Nahata (paras 15 and 16)

"Presumption as to constitutionality of a statute

15. Indisputably, there exists a presumption as regards the constitutionality of a statute. Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles. But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits. This rule in its application as principle of construction means that if two meanings are possible then the courts will reject the one which renders it unconstitutional and accept the other upholding the validity of the impugned legislation.

16. In Union of India vs. Elphinstone Spg. and Wvg. Co. Ltd., it was stated:

"9. A statute is construed so as to make it effective and operative. There is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates, such as those relating to fundamental rights, is always on the person who

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challenges its vires. Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution it must be allowed to stand as the true expression of the national will. The aforesaid principle, however, is subject to one exception that if a citizen is able to establish that the legislation has invaded its fundamental rights then the State must justify that the law is saved. It is also a cardinal rule of construction that if one one construction being given the statute will become ultra vires the powers of the legislature whereas on another construction which may be open, the statute remains effective and operative, then the court will prefer the latter, on the ground that the legislature is presumed not to have intended an excess of jurisdiction."

b. AIR 1977 SC 2279 in the matter of R.S. Joshi, etc. vs. Ajit Mills Limited and another, etc. (para 2)

"A prefatory caveat. When examining a legislation from the angle of its vires, the Court has to be resilient, not rigid, forward-looking, not static, liberal, not verbal in interpreting the organic law of the nation. We must also remember the constitutional proposition enunciated by the U.S. Supreme Court in Munn v. Illinois (1876) 94 US 113 (quoted in Labor Board v. Jones and Laughlin, (1936) 301 US 1, 33-34 – Corwin, Constitution of the USA, Introduction, p.xxxi) viz., 'that courts do not substitute their social and economic beliefs for the judgment of legislative bodies.' Moreover, while trespasses will not be forgiven, a presumption of constitutionality must colour judicial construction. These factors, recognised by our Court, are essential to the modus vivendi between the judicial and legislative branches of the State, both working beneath the canopy of the Constitution."

31 The learned Advocate General has further argued that the petitioners have not rebutted this presumption and have rather discharged the onus placed on them and it is always settled law that the Courts should lean in favour of constitutionality of a legislation and resort to harmonious construction and purposive interpretation wherever such an exercise is called for.

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32 Further, the learned Advocate General has contended that the Act under challenge does not run contrary to the judgment of the Supreme Court since paras 68 to 70 of the judgment in Pai Foundation case are clear and categorical. According to him, the judgment in Inamdar case was not made to overrule the judgment of Pai Foundation and the judgment in the former case has set right the inconsistency between the judgment in Pai Foundation case and Islamic Academy case and there is no law laid down by the Supreme Court in Inamdar case.

33 While rejecting the contention of the learned Senior Counsel for the petitioners that the Unni Krishnan case has been re-introduced, the learned Advocate General has argued that the impugned Act substantially implements the law declared by the Supreme Court in Pai Foundation case and as such, the contention of the learned Senior Counsel for the petitioners has to be brushed aside. It is his further contention that the Act under challenge has come as a great relief to the student community and it is not an exercise in futility since the substance of the Act is not to nationalise the seats, but to prevent commercialisation of education and that judicial notice can be taken of the undesirable practice adopted by the self-financing colleges/professional institutions in admitting students for considerations other than merit.

34 The learned Advocate General has further contended that admissions are completed even before merit list of candidates is published and in respect of non-members of consortium, it would be made by an authority authorised or approved by the State Government in this behalf and in case of equality of marks, the concept of assigning random numbers which is a logical method in Statistics, is more rational than the existing method of drawal of lots, as the ultimate parameter.

35 In reply to the query raised in regard to the consensual arrangement on seat-sharing, the Advocate General has argued that it cannot be confined to an annual exercise prejudicially affecting the interests of the students and creating uncertainty in their minds. The further contention of the Advocate General is that the State quota does not mean any quota for the State Government as such, but only means the number or percentage of seats in self-financing colleges in which admission is made by the State agency ensuring admission based on absolute merit, transparency and non-exploitative procedure. In this regard, he has further contended that the State may devise a suitable mechanism so as to take care of the poorer and weaker sections of the society and having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb mal-practices, it would be permissible to regulate admissions by way of centralised counselling and such a procedure, to a large extent, can secure grant of merit-based admissions on a transparent basis as per the law laid down in paragraph 138 of the judgment in Inamdar case.

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36 On the point of reservation policy in the unaided private educational institutions of minorities and non-minorities, the learned Advocate General has argued that observations in para 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or to adopt selection based on common entrance test of the State and there are also observations saying that they may frame their own policy to give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society. It is his further contention that the observations in the judgment of Pai Foundation case in para 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State.

37 He has further contended that the ruling of the 11 Judge Bench in Pai Foundation case, in paragraph 68, to the effect that a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency and this will incidentally take care of poorer and backward sections of the society and the prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges and the same principles may be applied to other non-professional but unaided educational institutions viz., graduation and post-graduation non-professional colleges or institutes, underlines the power of the State Government to consider the communal reservation based on the said Act enacted as Act No.45 of 1994 which is peculiar to the State of Tamil Nadu.

38 It is contended by the learned Advocate General that the three components of consensual arrangement, viz., seat-sharing, single window system and specifying the academic year are to be read in the light of law laid down by this Court in its judgment reported in (2006) 3 MLJ 648, pursuant to the judgment in Inamdar case.

39 It is further contended by the learned Advocate General that:

a. the question of reasonableness does not arise when consensual arrangement is incorporated and over the past two decades, seat-sharing had been done in the ratio of 50%-50% for non-minority institutions and 30%-70% for minority institutions under State quota and Management quota respectively and hence, the consensual arrangement made in Section 2(c)(iii) is perfectly in accordance with law and there is no unconstitutionality to strike down the Act.

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b. Section 4(1) of the Act cannot be construed to be in violation of Article 30 in view of the judgment in St. Stephen's College case and para 136 of the judgment in Inamdar case makes it clear and categorical that centralised counselling does not run contrary to the constitutional guarantee contained in Article 30 and in St. Stephen's College case, it was a college of Arts and Science and not a professional college and that case was concerned with the validity of a circular issued by the Delhi University and not with any State legislature and in view of this, the law laid down in St. Stephen's College case is clearly distinguishable.

40 In support of his argument that the judgment of the Supreme Court in St. Stephen's College case is distinguishable, the Advocate General has relied on paras 14 and 16 of the said judgment which read as under:

> "The Allahabad Agricultural Institute:
>
> 14. This is a professional college which offers several courses of study ini Agricultural Sciences. It is undisputedly an institution established and administered by the Christian religious minority. In 1911, it was founded by Christians under the leadership of Dr. Sam Higginbothom. It is now located on the right bank of Jamuna river at a tiny place called Naini in the famous pilgrimage and education centre of Allahabad. It has 600 acres campus including staff quarters, men's and women's hostels, library and administration buildings within ten departments and auxiliary units of the Institute. The institution imparts education in several courses of study like Inter Agriculture, Inter Home Science, Indian Dairy Diploma (IDD), B.Sc. in Agriculture, B.Sc. Home Economics, B.Tech. in Agricultural Engineering, M.Sc. in Agriculture and M.Sc. in Agricultural Engineering. It claims to be a national institute and every year it holds entrance test at different centres.
>
> . . .
>
> (1) In order to strengthen the spirit of national integration and to bring about the all Indian character of the Institute, the distribution of the seats will be as follows:
>
> (2) Scheduled Caste students who qualify the Entrance Test and old students will be adjusted in each of the respective quota and zones first.

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(3) In each of the categories only those who have qualified in the entrance test will be considered and admitted strictly in order of merit within each list.

(4) Disciplinary action – Any student who has a disciplinary action taken against him/her will not be admitted to any course in this Institute.

(5) Not less than 25 per cent of the enrollment shall be women students."

16. Being aggrieved by the decision of the High Court, the Institute by obtaining certificate under Article 133(1)(a) of the Constitution has preferred Civil Appeal Nos.1831-41 of 1989. Civil Appeal Nos.1786 of 1989 and 2829 of 1989 are by some of the students. They are connected appeals against the same judgment of the Allahabad High Court."

41 As regards the manner in which the the phrase "appropriate authority" as defined under Section 2(a) of the Act has to be interpreted, the learned Advocate General has contended that it is referable only to Section 3 in respect of admission to Government seats and this is made clear by Section 5(4) which has concisely employed the term "respectively" to specify the distinction between "appropriate authority" and "consortium of self-financing colleges" and the phraseology employed in Section 4(1) of the Act "Authority authorised by the Government" has to be understood with reference to the context in which the same is used and the principle of interpreting the statutory provision, taking into consideration the contextual connotation, the scheme of the Act and its provisions in its entirety, make it very clear that the "authority authorised by the Government" is an authority distinct and different from the "appropriate authority" as defined in Section 2(a) of the Act and if so read and understood, there is no scope or necessity for reading down the provisions of Section 4(1) and as such, there is no ambiguity, illegality or unreasonableness in the Act to strike down the same;

42 On the aspect of "reading down", the Advocate General has placed reliance on a judgment of the Supreme Court reported in (2007) 1 SCC 732 in the case of Arun Kumar and others vs. Union of India and others (paras 55 & 64)

"55 The doctrine of "reading down" is well known in the field of constitutional law. Colin Howard in his well-known work Australian Federal Constitutional Law states:

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> "Reading down puts into operation the principle that so far as it is reasonably possible to do so, legislation should be construed as being within power. It has the practical effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the Court will construe it in a more limited sense so as to keep it within power."

> 64. Similarly, in Delhi Transport Corpn. v. DTC Mazdoor Congress, the validity and vires of Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 relating to "termination of service" was challenged. It provided for termination of service of permanent employees of the Corporation on one month's notice or pay in lieu of notice without any enquiry whatsoever. The provision was challenged, being ultra vires the Constitution, violative of the principles of natural justice and inconsistent with Section 23 of the Contract Act, 1872. One of the questions raised before this Court was whether it would be open to a court of law to apply the formula of "reading down" and save the provision by importing natural justice into it. The majority (4:1) held the provision ultra vires and unconstitutional by describing it as "Henry VIII clause" and refusing to apply the doctrine of "reading down". It held that the language of the regulation was clear, unambiguous and explicit and it was not permissible for the court to read down something not intended by the Regulations. The doctrine of reading down may be applied if the statute is silent, ambiguous or allows more than one interpretation. But where it is express and clearly mandates to take certain actions, the function of the court is to interpret it plainly and declare intra vires or ultra vires without adding, altering or subtracting anything therein."

43 With regard to the contention of the learned Senior Counsel for the petitioners that the impugned Act is the result of colourable exercise of power, the learned Advocate General has contended that the doctrine of colourable exercise of power is a constitutional law and this doctrine applies only to transgression or encroachment by the legislature into

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areas where they are not competent to legislate and therefore, in the absence of any legislative incompetency, there is no point of law to say that there is colourable exercise of power in the impugned Act which has to be upheld. In this context, the Advocate General has relied on:

a. a judgment of the Supreme Court reported in (2003) 9 SCC 358 in the case of Welfare Association, A.R.P. Maharashtra and another vs. Ranjit P. Gohil and others (para 42)

> "42. The doctrine of colourable legislation came to be examined by a Constitution bench of this Court in K.C. Gajapati Narayan Deo v. State of Orissa. It was held that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motives does not arise at all. Whether a statute is constitutional or not is thus always a question of power. The crucial question to be asked is whether there has been a transgression of legislative authority as conferred by the Constitution which is the source of all powers as also the separation of powers. A legislative transgression may be patent, manifest or direct or may also be disguised, covert and indirect. It is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The expression means that although apparently a legislature in passing a statute which purports to act within the limits of its powers, yet in substance and in reality it transgresses those powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. The discerning test is to find out the substance of the Act and not merely the form or outward appearance. If the subject-matter in substance is something which is beyond the legislative power, the form in which the law is clothed would not save it from condemnation. The constitutional prohibitions cannot be allowed to be violated by employing indirect methods. To test the true nature and character of the challenged legislation, the investigation by the court should be directed towards examining (i) the effect of the legislation and (ii) its object, purpose or design.

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While doing so, the court cannot enter into investigating the motives, which induced the legislature to exercise its power."

b. yet another judgment of the Supreme Court reported in (1997) 8 SCC 522 in the case of S.S. Bola and others vs. B.D. Sardana and others (para 132)

"Colourable legislation would emerge only a legislature has no power to legislate on an item either because it is not included in the list assigned to it under the respective entries in the Seventh Schedule to the Constitution or on account of limitations imposed either under Part III of the Constitution relating to Fundamental Rights or any other power under the Constitution. As the legislature enacts on an assumption of such power, but when on examination, if it is found that it has travelled beyond its power or competence or in transgression of the limitations imposed by the Constitution itself, such an enactment is called a colourable legislation. It has reference only to the legislative incompetence and not to the power as such. If the legislature enacts law in the pretext of the exercise of its legislative power, though actually it did not possess such power, the legislation to that extent becomes void as the legislature makes its Act only in pretence of and in purported colourable exercise of its power."

44 To elucidate as to how a legislation has to be interpreted, the learned Advocate General has placed reliance on:

a a judgment of the Supreme Court reported in (2005) 2 SCC 409 in the matter of Prakash Kumar alias Prakash Bhutto vs. State of Gujarat (para 20)

"Before we proceed to consider the rigours of Sections 15 and 12, we may at this stage point out that it is a trite law that the jurisdiction of the court to interpret a statute can be invoked only in case of ambiguity. The court cannot enlarge the scope of legislation or intention when the language of the statute is plain and unambiguous. Narrow and pedantic construction may not always be given effect to. Courts should avoid a construction which would reduce the legislation to futility. It is also well settled that every statute is to be interpreted without any violence to its language. It is also trite that when an expression is capable of more than one meaning, the court would attempt to resolve the ambiguity in a

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manner consistent with the purpose of the provision, having regard to the consequences of the alternative constructions. In this connection, we may notice a few decisions of this Court. "

b another judgment of the Supreme Court reported in (2005) 2 SCC 271 in the matter of Nathi Devi vs. Radha Devi Gupta (paras 13 to 18)

"13 The interpretative function of the court is to discover the true legislative intent. It is trite that in interpreting a statute, the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional.

14 It is equally well settled that in interpreting a statute, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors.

15 It is well settled that literal interpretation should be given to a statute if the same does not lead to an absurdity.

16 In Nasiruddin v. Sita Ram Agarwal, this court stated the law in the following terms:

"37. The court's jurisdiction to

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interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression "shall or may" is not decisive for arriving at a finding as to whether the statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character."

17 Even if there exists some ambiguity in the language or the same is capable of two interpretations, it is trite that the interpretation which serves the object and purport of the Act must be given effect to. In such a case, the doctrine of purposive construction should be adopted.

18 In High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat this Court held:

"35. This court while interpreting the provision of a statute, although, is not entitled to rewrite the statute itself, is not debarred from 'ironing out the creases'. The court should always make an attempt to uphold the rules and interpret the same in such a manner which would make it workable.

36. It is also a well-settled principle of law that an attempt should be made to give effect to each and every word employed in a statute and such

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interpretation which would render a particular provision redundant or otiose should be avoided."

c. yet another judgment of the Supreme Court reported in (2003) 7 SCC 589 in the case of Indian Handicrafts Emporium and others vs. Union of India & others (paras 99, 102 & 103)

"102. In District Mining Officer v. Tata Iron & Steel Co., this Court stated:

"A statute is an edict of the legislature and in construing a statute, it is necessary to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the court is to act upon the true intention of the legislature. If a statutory provision is open to more than one interpretation, the court has to choose that interpretation which represents the true intention of the legislature. This task very often raises difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for. Nonetheless, the function of the courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the

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application of the legislation in hand may be called for and words chosen to communicate such indefinite referents are bound to be in many cases, lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words, the legislative intention, i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed."

103. In State of A.P. v. McDowell & Co., this Court held:

"An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the need of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety. The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled."

45 During the course of his arguments, the learned Advocate General, in support of his contentions, has relied on the judgments of the Supreme Court in Islamic Academy case and Inamdar case and the relevant paras relied on by him are as below:

Islamic Academy case:

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"19 The Committee shall have the powers to oversee the tests to be conducted by the association. This would include the power to call for the proposed question paper(s), to know the names of the paper-setters and examiners and to check the method adopted to ensure papers are not leaked. The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner. The Committee shall have the power to permit an institution which has been established and which has been permitted to adopt its own admission procedure for the last, at least, 25 years, to adopt its own admission procedure, and if the Committee feels that the needs of such an institute are genuine, to admit, students of their community, in excess of the quota allotted to them by the State Government.

20 Our direction for setting up two sets of Committees in the States has been passed under Article 142 of the Constitution of India which shall remain in force till appropriate legislation is enacted by Parliament. The expenses incurred on the setting up of such Committees shall be borne by each State. The infrastructural needs and provision for allowance and remuneration of the Chairman and other members of the committee shall also be borne by the respective State Government."

P.A. Inamdar case:

"153 We have placed on record in the earlier part of this judgment and, yet, before parting we would like to reiterate, that certain recitals, certain observations and certain findings in Pai Foundation are contradictory inter se and such conflict can only be resolved by a Bench of a coram larger than Pai Foundation. There are several questions which have remained unanswered and there are certain questions which have cropped up post Pai Foundation and Islamic Academy. To the extent the area is left open, the Benches hearing individual cases after this judgment would find the answers. Issues referable to those areas which are as which are already covered by Pai Foundation and yet open to question shall have to be answered by a Bench of a larger coram than Pai Foundation. We leave those issues to be taken care of by posterity.

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> 154 . . . This judgment shall not have the effect of disturbing the admissions already made or with regard to which the process has already commenced. The law, as laid down in this judgment, shall be given effect to from the academic year commencing next after the pronouncement of this judgment.
>
> 155 It is for the Central Government, or for the State Governments, in the absence of a Central legislation, to come out with a detailed well-thought-out legislation on the subject. Such a legislation is long awaited. The States must act towards this direction. The judicial wing of the State is called upon to act when the other two wings, the legislature and the executive, do not act. The earlier the Union of India and the State Governments act, the better it would be. The Committees regulating admission procedure and fee structure shall continue to exist, but only as a temporary measure and an inevitable passing phase until the Central Government or the State Governments are able to devise a suitable mechanism and appoint a competent authority in consonance with the observations made hereinabove. Needless to say, any decision taken by such Committees and by the Central or the State Governments, shall be open to judicial review in accordance with the settled parameters for the exercise of such jurisdiction.

46 To supplement his argument that the Statement of Objects and Reasons need not necessarily spell out the entire scheme of the Act, the learned Advocate General has relied on a decision of the Supreme Court reported in (2006) 7 SCC 1 in the case of Kuldip Nayar vs. Union of India (para 280)

> "As regards the criticism that the reasons given in the counter-affidavit of the Union of India are distinct from those set out in the Statement of Objects and Reasons of the Bill that became the impugned law, we may only state that the Statement of Objects and Reasons of a proposed legislation is not the compendium of all possible reasons or justification. We do not find any contradiction in the stand taken by the Union of India in these proceedings in relation to the Statement of Objects and Reasons of the impugned amendment."

47 In support of his arguments, the learned Advocate General has further relied on a judgment of the Supreme Court reported in 2007 (2) CTC

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677 in the matter of Minor S. Aswin Kumar & others vs. State of Tamil Nadu represented by its Secretary to Government, Higher Education Department, Fort. St. George, Chennai – 2 & others (para 53)

> "53. When a Common Entrance Test is prescribed, it may mean merely a method of selection or relatable to laying down of a minimum standard. If it is only the method of selection and not relatable laying of standard as such, the law is traceable to Entry 25 of List III, but, if it prescribes "standard", it owes its origin to Entry 66 of List I. In the latter case, the State cannot make any law impinging upon the law relatable to Entry 66 of List I. However, where such Central law is not relatable to Entry 66 of List I but Entry 25 of List III, the State can make law under such Concurrent List and if there is any conflict the State law may prevail provided Article 254(2) is complied with. Even though the State can prescribe higher standard it cannot make a Central Act mugatory (see Adhiyaman's case). Where Common Entrance Test is merely the basis of selection, it may come under Entry 25 of List III rather than under Entry 66 of List I. Where, however, the Central Rule prescribes minimum marks either in qualifying examination or in Common Entrance Test or in both, it is obviously relatable to Entry 66 of List I rather than Entry 25 of List III as it intends to lay down a particular standard. Laying of higher standard by State is possible, but lowering of standard is not possible. Where there is scope for construing that Medical Council of India Regulation, AICTE Regulation prescribe Common Entrance Test for short listing the candidates or method of selection at the graduate level without prescribing any minimum marks, it is possible to construe that such regulation is pursuant to jurisdiction under Entry 25 of List III rather than Entry 66 of List I."

48 While defending the Act, the learned Advocate General, at the end of his arguments, has submitted that the Government, while bringing the Act into force, has taken note of the local needs of the State, particularly the population of the various sections of the society, the minority population in particular, which is a matter of State policy and thus, while giving importance to the consensual arrangement, the Legislature has taken note of the very purpose of the legislation and the State has made use of its power to make laws to achieve the constitutional goals, bearing in mind, the rulings of the Supreme Court in Pai Foundation case and Inamdar case and therefore, the Act is not impugned with inconsistency or ambiguity or colourable exercise of power nor there is legislative incompetency on the part of the State in passing the Act and as such, the Act need not be struck down since it is perfectly in order.

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49 In the light of the various contentions raised by the learned Senior Counsel appearing for the petitioners and the learned Advocate General on behalf of the State, let me proceed to examine whether the Sections challenged in the Act, viz., 2(c)(iii), 4(1) and 5(4) are against the rights guaranteed under the Constitution of India under Articles 19(1)(g) and 30. In this context, the jurisdiction of the Court to interpret a statute in the light of the true legislative intent needs to be necessarily looked into. There are circumstances when a statute can be interpreted when the same is ambiguous; but while doing so, the Court can iron out the fabric, but, it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It is trite that in interpreting a statute, the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense.

50 The scope of this Court is only to expound and not to legislate. In a modern State, the legislation is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the legislature based on the facts derived from past and present experience. It is impossible to anticipate fully, the varied situations arising in future in which the application of the legislation in hand may be called for and words chosen to communicate such indefinite referents are bound to be in many cases, lacking in clarity and precision and thus giving rise to controversial questions of construction. A statute is best interpreted when we know why it is enacted. The statute must be read, first as a whole, and then section by section, clause by clause, phrase by phrase and word by word and last but not the least, the real intention of the statute maker also, needs to be looked into. The court cannot sit in judgment over the wisdom of the Legislature and an enactment cannot be struck down on the ground that the Court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the need of the people and what is good and bad for them.

51 While Article 19(1)(g) of the Constitution provides that all citizens shall have the right to practise any profession or to carry on any occupation, trade or business, Article 19(6) provides that nothing in sub-clause (g) of Article 19(1) shall affect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the rights conferred by the said sub-clause, and in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to the professional or technical qualifications necessary for practising any profession or carrying on any occupation,

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trade or business. Further, Article 30(1) provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice and these provisions provide for their right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1)(g). Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g), yet the founding fathers of the Constitution felt the need for enacting Article 30. Therefore, Article 30 (1) is intended to instil confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. In other words, it is a protection for the minorities which is guaranteed for the minorities under this Article. But for this Article, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under Article 19(6) and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation. It is made clear that whatever the guarantees which are available to them have always been controlled or regulated by law under Article 19(6).

52 In the light of the above, it is to be seen whether the impugned Act has infringed in any way the rights available to the minority educational institutions.

53 Now, coming to Section 2(c)(iii) of the Act is concerned, it is to be seen whether it infringes the rights guaranteed under Article 19(1)(g) and Article 30 of the Constitution.

54 To examine this aspect, it would be worth referring to the law laid down by the Supreme Court in Pai Foundation case, in which, the relevant portion of para 68, reads as under:

> "It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be

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done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges."

55 The Supreme Court, in its judgment in Inamdar case, has reiterated the above position in para 125 and the relevant portion of it reads as below:

". . . neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala Education Bill which was approved by Pai Foundation, is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in Pai Foundation. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit."

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56 In para 126 of the judgment of the Supreme Court in Inamdar case, it was held as follows:

". . .reading the whole judgment (in the light of previous judgments of this Court, which have been approved in Pai Foundation) in our considered opinion, observations in para 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on common

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entrance test of the State. There are also observations saying that they may frame their own policy to give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society."

57 In para 128 of its judgment in Inamdar case, the Supreme Court held:

"We make it clear that the observations in Pai Foundation in para 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State."s

58 The Supreme Court, in para 130 of its judgment in Inamdar case, while reiterating the law laid down in Pai Foundation case, disapproved with the judgment in Islamic Academy case to the extent it allows the States to fix quota for seat-sharing between the management and the States on the basis of local needs of each State whereas there is no disapproval or any other understanding of the Pai Foundation case and what is intended in Pai Foundation case in paragraph 68 has been reiterated in Inamdar case.

59 Further, it is to be seen as to whether the rights under Article 19(1)(g) and Article 30(1) of the Constitution of India are equal. A right conferred on a citizen of India in terms of Article 19(1)(g) of the Constitution of India, indisputably, is subject to reasonable restrictions which may be imposed in public interest under clause (6) thereof. Non-minority educational institutions would have the same rights as those conferred on minority educational institutions by Article 30. Non-minority educational institutions do not have the protection of Article 30. Therefore, in certain matters, they cannot and do not stand on a similar footing as minority educational institutions. Even though the principle behind Article 30 is to ensure that the minorities are protected and are given an equal treatment, yet, the special right given under Article 30 does give them certain advantages in matters of establishing and administering their educational institutions. Further, minority educational institutions have preferential right to admit students of their own community or language and the same is not available as far as non-minority educational institutions are concerned.

60 As pointed out by Mr. Rajeev Dhavan, learned Senior Counsel appearing for the petitioner Consortium, the decision rendered in Pai Founation case in para 68 and reiterated in Inamdar case in paras 126 to 128, has, in effect, merely permitted unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on common entrance test of the State and they are also permitted to frame their own policy to

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give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society.

61 In paragraph 128 in Inamdar case, reiterating para 68 of the Pai Foundation case, it was held that fixation of percentage of quota is to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State. In my opinion, these rulings of the Supreme Court and the impugned Section 2(c)(iii) are to be tested based on the judgment of this Court reported in 2006 (3) MLJ 648 which was decided by recording the proceedings of both the parties.

62 In the above referred to decision, the consensual arrangement reached by the consortium and the State for 65%-35% of the seats in respect of non-minority engineering colleges and 50%-50% in respect of minority engineering colleges ended in a finality and there was no appeal and in this decision, it is nowhere spelt out that the consensual arrangement is made only for that year alone except in paragraph 14 wherein it has been held as under:

> "Keeping in tune with the binding precedents as referred to, and also the order of the Supreme Court in SLP Nos.9652, 9743 and 9744 of 2006, dated 12.06.2006 permitting the P.A. Inamdar to follow the practice which was adopted for the previous academic year 2005-2006 for the academic session 2006-2007, in the course of submission made by the learned counsel appearing for the respective parties, a glimmer of an amicable settlement between the petitioner and the State Government streaked through, in respect of sharing of seats between the parties, applicability of rule of reservation and the mode of admission. These, being the major area of controversies arising in these writ petitions, this Court directed the parties to work out the modality of the settlements through consensus."

63 Further, in para 16 of the above referred to judgment, it was held as under:

> "The affidavits placed by the respective parties are taken on record. In terms of the settlement arrived at between the parties and as placed on record in the respective affidavits, the following conditions are issued on the basis thereof, without the need for traversing into the legal merits as set out hereunder: "(a)The non-minority unaided engineering colleges shall surrender 65 per cent of the seats to the State Government; (b) The minority unaided engineering colleges shall surrender 50 per cent of the seats to the State Government; (c) The State Government shall be

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entitled to fill up the seats surrendered as mentioned above by following the single window system based on ranking done by the Anna University and the rule of reservation of the State Government; (d) In the light of the order passed by the Supreme Court in SLP Nos.9652, 9743 and 9744 of 2005, dated 12.06.2006 in P.A. Inamdar and others vs. State of Maharashtra, the State Government shall adopt the procedure followed during the previous academic year 2005-2006 and accordingly, the State Government shall not insist upon the petitioners to make admission against the seats retained or held by them by following the single window system; (e) The admission to the seats available to the unaided Engineering Colleges, both minority and non-minority shall be made on the basis of marks obtained in the common entrance test (CET) and the marks obtained in the +2 examination; (f) The marks obtained in the Common Entrance Test shall be from any one fo the following tests conducted by:(i) CET conducted by the Consortium(ii) CET conducted by Anna University; and (iii)CET conducted by AEEE or any other CET conducted by the Government or the Government agencies of the other States (g) The rule of reservation shall be followed in admission to management seats retained by the non-minority unaided engineering college after setting apart 15 per cent quota of seats to NRI; and (h) the rule of reservation shall not be applicable to minority unaided engineering college and the procedure for admission of students as followed in the previous year shall be followed and inter se merit alone is the criterion, as declared by the Supreme Court in paragraph No.132 of P.A. Inamdar case."

The above directions, those based on the consensus reached between the parties, in my opinion, are nevertheless in conformity with the principle enunciated by the Supreme Court and modulated in terms of the principles and observations contained in the judgments referred to above."

From a reading of the above portion, it can be seen that it has not spelt out that this consensual arrangement is only for 2006-2007.

64 That apart, one of the main attacks on the side of the petitioners is that the arrangement of 65% - 35% in case of non-minority engineering colleges and 50% - 50% in case of minority engineering colleges is an unilateral re-writing of contract and therefore, the concept of consensus would not continue as the consensual arrangement cannot be taken as a tacit consent. It is also seen that the present Act

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was made on 03.03.2007 and a Division Bench of this Court on 27.04.2007, has also upheld the validity of Section 4 of the Act and thereafter, the schedule for admission was announced in May 2007 and the process of admission has commenced on 13.5.2007 with the issue of application forms whereas the present Act has been challenged by the petitioner only on 13.06.2007. Moreover, it can be seen that over the past 20 years, seat sharing had been done in the ratio of 50%-50% for non-minority institutions and 30%-70% for minority institutions under State quota and Management quota respectively. It was also brought to the notice of this Court that as many as 16,000 and more seats have fallen vacant in Management quota in many colleges and as per the consensual arrangement, the Managements have surrendered higher percentage of seats. This being the position, Section 2(c)(iii) of the Act is not, in any way, in infringement of the constitutional rights guaranteed under Article 19(1)(g) or 30(1) of the Constitution and it is also not in violation of the rulings of the Supreme Court in Pai Foundation case and Inamdar case. In that view of the matter, I do not find any unconstitutionality in Section 2(c)(iii) of the Act.

65 Coming to the second challenge in the writ petitions which is Section 4(1) of the Act, it is contented on the side of the petitioners that there cannot be any ambiguity in the provision of the Act. It is to be borne in mind that there must be a plain meaning and the Court cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words and in that case, the real intention of the legislation must be gathered from the words used and the intention of the legislation must be found out from the scheme of the Act.

66 One of the strenuous contentions made by the Senior Counsel for the petitioners is that the Act does not state the method of admission for self-financing colleges which are not members of the consortium and therefore, the Act is an exercise in futility. An explanatory reply has been given in the defence made by the learned Advocate General to the effect that the term "appropriate authority" as defined in Section 2(a) of the Act is referable only to Section 3 in respect of admission to Government seats and that this is made clear by Section 5(4) which reads "the appropriate authority and the consortium of unaided professional educational institution shall prepare the rank lists for admission of students to the seats referred to in section 3 and section 4. Thus, the phraseology used in Section 4(1) of the Act "authority authorised by the Government" has to be understood with reference to the context in which the same is used. It is well-settled principle that while interpreting a statute, the interpretative function of the court is to discover the true legislative intent. A statute is best interpreted when we know why it was enacted. It must be read, first as a whole, and then section by section, clause by clause, phrase by phrase and word by word and therefore, taking into consideration the contextual connotation and the scheme of the Act, its provisions in their entirety, make it very clear

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that the authority authorised by the Government is an authority distinct and different from the appropriate authority as defined in Section 2(a) of the Act and if so read and understood, there is no scope or necessity for reading down the provision of Section 4(1). In order to find out whether this provision, in any way, takes away the rights of the petitioners or is in contravention of the rights guaranteed under Article 19(1)(g) or 30 of the Constitution, a query has been raised as to who is the appropriate authority for an engineering college which is not a member of the consortium. In this context, it should be understood that the authority authorised by the Government in respect of Government seats is the University and for the non-member, it is the authority authorised by the Government and this submission made by the Advocate General also explains that in respect of seats under 2(c)(iii), the consortium is to select the students subject to the approval by Government or by any authority authorised by the Government on the basis of marks obtained by students in the relevant subjects in the qualification examination. Therefore, under the definition for "appropriate authority" under Section 2(a) in the context of reading of Section 4(1), it is made clear that in respect of their admission of students, they have to select and admit the students based on the marks obtained by them in the qualifying examination and thereafter, it has to be approved by the Government. Thus, when the right of admission in respect of the unaided minority and non-minority educational institutions is within their helm of affairs and the control and management is with them, the definition under Sections 2(a) and 4(1) is in no way ambiguous and does not, in any way, take away the rights of the petitioners which are guaranteed under the Constitution. In other words, admissions to seats other than the seats mentioned in Section 2(c)(iii) are made by the consortium and approved by the Government or any authority authorised by the Government and this power of the State to allot seats to admission made by the consortium in respective Colleges is in conformity with the decision of the Pai Foundation case which is reiterated in Inamdar case and is also not in violation of Article 30 of the Constitution. In that view of the matter, this Court holds that there is no infringement of rights of the minorities or the non-minorities in admitting students in accordance with the provision of Section 4(1) which is unambiguous and accordingly, I do not find any vires or illegality to declare Section 4(1) as unconstitutional.

67 Coming to the third impugned Section in the Act, viz. Section 5(4) which states that the appropriate authority and the consortium of unaided professional educational institutions shall prepare the rank lists for admission of students to the seats referred to in Sections 3 and 4 respectively and allot students through centralised counselling, it is contended on the side of the petitioners that centralised counselling amounts to single window system of admission, taking away the rights of the petitioners guaranteed under Part III of the Constitution, particularly when the ruling of the Pai Foundation and Inamdar objected to the procedure to follow single window system in respect of self-financing colleges, and thus, it is in contravention and violation of the basic

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constitutional rights guaranteed to them and also the settled proposition of law laid down by the Supreme Court.

68 On the other hand, the learned Advocate General, in categorical terms, has submitted that there are about 247 self-financing colleges in the State and taking note of the proportionality of the minority population of the State and also the overall interest of the student community at large and also the local needs of the State as directed by the Supreme Court and the excellence in education and maintenance of higher standards, the State has enacted the Act contemplating proper method of admission procedure by selecting students and allotting the same to the engineering colleges through centralised counselling.

69 An important query raised on the side of the petitioners is that when Section 3 of the Act provides that admission to every Government seat in every professional educational institution shall be made by the appropriate authority and when Section 4 provides for admission made by the consortium, whether the appropriate authority under Section 5(4) can decide the allotment of 35% of the seats in Management quota and thus, the centralised counselling has taken away the right of the consortium.

70 Mr. Rajeev Dhavan, learned Senior Counsel appearing for the petitioner Consortium has attacked Section 5(4) of the Act contending that the State cannot insist on private educational institutions which do not receive any aid from the State to implement the State's policy on reservation for granting admission on lesser percentage of marks or to say in other words, on any criterion except merit and if the State is allowed to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, it would amount to nationalisation of seats which has been specifically disapproved in Pai Foundation case and Inamdar case which make it clear and categorical that centralised counselling or single window system runs contrary to the constitutional rights guaranteed under Article 30 of the Constitution which view is also endorsed in St. Stephen's College case.

71 The learned Advocate General, in reply to the reliance made by Mr. R. Muthukumaraswamy, learned Senior Counsel on the decision of the Supreme Court in St. Stephen's College case, has contended that the said College which has been functioning for more than 100 years, is an Arts and Science College and not an engineering or medical college and moreover, the challenge in the said case was to a Circular issued by the Delhi University and not to a legislation as in the present case and in view of these, the said judgment is very much distinguishable and as such, cannot be applied to the facts of the case on hand.

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72 In the light of this position, this Court has to test whether Section 5(4) of the Act is in conformity with the constitutional rights guaranteed and the rulings of the Supreme Court in Pai Foundation case and Inamdar case.

73 In Pai Foundation case, it has been held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefor subject to its being fair, transparent and non-exploitative. A right to administer neither includes the right to mal-administer nor an absolute right. But, it must be subject to reasonable regulations for the benefit of institutions as the field of education, consistent with national interest. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also. It is difficult to comprehend that the framers of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution.

74 It would be relevant to consider the question as to what is the reasonable restriction enshrined in the Constitution under Article 19(6). of the Constitution. Appropriation of seats cannot be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1). It is argued that merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of centralised counselling. The answer to this lies in para 161 of the Pai Foundation case judgment which states that the State Government concerned has to notify the percentage of the non-minority students to be admitted; observance of inter se merit amongst the applicants belonging to the minority group could be ensured; in the case of aided professional institutions, it can also be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission; as regards non-minority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of the common entrance test held by the State agency followed by counselling wherever it exists. It was further held that all citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, and to minorities specifically under Article 30. While reiterating the decision in Pai Foundation case, it is held in para 136 in Inamdar case as "Holding of such common entrance test followed by centralised counselling or, in other words, single-window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of the list of successful candidates prepared at CET without altering the order of merit inter se of the students so chosen." Further, para 138 of

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the same judgment reads to the following effect: "It needs to be specifically stated that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb mal-practices, it would be permissible to regulate admissions by providing a centralised and single window procedure. Such a procedure, to a large extent, can secure grant of merit-based admissions on a transparent basis..."

75 Considering the power of the State in bringing a centralised counselling which has taken into consideration the overall interest of the student community and the need to promote merit with a view to achieve excellence and curb mal-practices and taking note of the fact that all institutions imparting same or similar professional education emphatically demanded that the admission procedure should be in line with the rulings of the Supreme Court in the Pai Foundation case and Inamdar case and when the judgment in Inamdar case has reiterated that it would be permissible to regulate admissions by centralised counselling taking cognizance of larger public interest and to secure merit based on a transparent basis and since the State has taken note of the ruling of Supreme Court in accordance with the constitutional guarantees while framing Section 5(4) based on the various local needs and problems prevailing all along in the matter of centralised counselling and admission, the legislative intent being clear, I do not find any illegality or unconstitutionality in this Section too. Thus, in short, since all the three impugned Sections have passed the test to prove that they are not ultra vires and unconstitutional, no need whatsoever arises to strike down the same and as a consequence, they are upheld.

76 That apart, with regard to reasonableness, the Supreme Court, in its judgment reported in (2006) 8 SCC 212 in the case of M. Nagaraj and others vs. Union of India and others, has referred to the judgment in the case of A.K. Gopalan vs. State of Madras reported in 1950 SCR 88 and yet another decision in the case of Maneka Gandhi vs. Union of India reported in (1978) 1 SCC 248, wherein it was held that the procedure contemplated by Article 21 must answer the test of reasonableness. It was further held that the procedure should also be in conformity with the principles of natural justice and this example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression "life" in Article 21 does not connote merely physical or animal existence. Further in the case of Minerva Mills Limited vs. Union of India reported in (1980) 3 SCC 625, it was held that the Constitution confers rights which are elementary for the proper and effective functioning of democracy. For a Constitutional principle to clarify as a scientific feature, it must be established that the said principle is a part of the Constitutional law binding on the Legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so found as to bind even the amending power of the Parliament. Therefore, axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights. These

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principles are beyond the amending power of Parliament. Hence, the question of reasonableness cannot be a factor to be reckoned with in this case as per the proposition laid down by the Supreme Court in its various decisions, particularly in view of the fact that the petitioner consortium has already arrived at a consensus with the State in the last year and as already stated, this fact has also been recorded by this Court in its judgment reported in 2006 (3) MLJ 648. This being the position, the petitioners are estopped from arguing on the point of reasonableness with regard to the legislative intent of the law-makers in the instant case.

77 On the question of severability, in determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor and the test to be applied is whether the legislature would have enacted the valid part, if it had known that the rest of the statue was invalid. In the instant case, as the challenge is only to three of the Sections of the Act and in view of my findings that these Sections do not, in any manner, take away the rights of the petitioners, I am of the considered view that no necessity arises to harp on the doctrine of severability.

78 On the aspect of proportionality, it is contended on the side of the petitioners that the principle of proportionality has been applied vigorously to legislative and administrative action in India and while dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, the Supreme Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. In the present case, since the restrictions made are reasonable and are not in infringement of the rights of the petitioners, I hold that the principle of proportionality, as contended by the counsel for the petitioners, does not have legs to stand.

79 In conclusion, it is to be noted that a statute is construed so as to make it effective and operative. There is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates, such as those relating to fundamental rights, is always on the person who challenges its vires. Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will as was reported in 1931 AC 275 in the case of Shell Co. of Australia v. Federal Commissioner of Taxation. It is for that person to show that there has been a clear transgression of Constitutional principles. The only exception is if a citizen is able to establish that the legislation has invaded its fundamental rights, then the State must justify that the law is saved. If two interpretations are possible, it can only be applied to resolve a conflict when there is such an interpretation. But, when the meaning is clear and unambiguous, this Court has no power to widen its horizon to test the legislative process.

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80 It is always to be remembered that an enactment cannot be struck down on the ground that Court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the need of the people and what is good and bad for them.

81 I am conscious of my jurisdiction and the interpretative function of the Court is to discover the true legislative intent. I have considered the purpose, objects and reasons of the Act and I have also given due attention to the basic rights of the parties and the rulings of the Supreme Court in Pai Foundation case and Inamdar case so also to other judgments relied on by the counsel on either side. From a reading of the impugned Sections and considering the whole context of the Act, I am satisfied that the legislative intent has been in conformity with the constitutional mandate and the object sought to be achieved by the legislation. In all the more, taking note of the local needs and specifically, larger interest and welfare of the student community and to promote merit, achieve excellence and curb mal-practices, the Act has been tested and given effect to. According to the Supreme Court, it is for the Central Government or for the State Governments, in the absence of a Central legislation, to come out with a detailed and well-thought-out legislation on the subject. Such a legislation is long awaited. The State must act towards this direction. The judicial wing of the State is called upon to act when the other two wings, the legislature and the executive, do not act. Thus, the Supreme Court's view to bring out a legislation has been felt by the State Government and the same has been now brought out for the good governance of the educational field in total and also to achieve national wealth in the field of education. In view of these reasons, I do not see any illegality or unconstitutionality in Sections 2(c)(iii), 4(1) and 5(4) impugned in the Act and the consequential G.O. Ms. Nos.115 and 87 dated 25.05.2007 and 16.03.2007 respectively; as such, the writ petitions which deserve no consideration are liable to be dismissed and are accordingly dismissed. No costs.

82 Coming to impleading petitions in M.P. Nos.3 to 11 of 2007 in W.P. No.20212 of 2007 which are filed by some of the students, it is relevant to state, in this context, that they were filed at the time when arguments were almost completed by the learned Senior Counsel for the petitioners as well as by the learned Advocate General for the respondent-State and when the orders were about to be reserved. That apart, learned Senior Counsel appearing for the petitioners too have raised their respective serious objections in considering the impleading petitions. Needless to say, the State has already taken interest in defending the legislation, considering the importance attached to it. Lastly, it is worth pointing out that this Court, in an identical case, in its decision reported in 1985 WLR 306, in the case of the Film Federation of India represented by its President D. Ramanujam vs. The Union of India represented by Secretary to Government, Ministry of Education, Culture and

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Social Welfare, New Delhi and 2 others, has dismissed the impleading petition and the relevant portion for the consideration of this Court is as under:

> "11. . . .This is not a matter involving any individual rights and it is enough that the Union of India is a respondent when the question of validity of the Central enactment is to be adjudicated upon. It is enough if the Union of India is on record even if a declaration of invalidity is to be granted. The presence of any additional party is wholly unnecessary."

83 In view of the aforesaid reasons and following the decision of this Court referred to above, M.P. Nos.3 to 11 of 2007 in W.P. No.20212 of 2007 are dismissed.

Since the writ petitions stand dismissed, the connected Miscellaneous Petitions are closed.

cad

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1 The Secretary to Government of Tamil Nadu
Higher Education Department
Secretariat, Chennai - 600 009

2 The Director of Technical Education
Chennai - 600 025

3 The Secretary to Government of Tamil Nadu
Law Department
Secretariat, Fort St. George, Chennai - 600 009

4 The Registrar
Anna University, Sardar Patel Road
Guindy, Chennai - 600 025

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5 The Secretary to Government of Tamil Nadu
Health & Family Welfare Department
Secretariat, Fort St. George, Chennai - 600 009

6 The Director of Medical Educational
Kilpauk, Chennai - 600 009

7 The Additional Director of Medical Education
Selection Committee
Directorate of Medical Education
Kilpauk, Chennai - 600 010

+ 2 ccs to Mr. V. Ayyadurai, Advocate on payment of Charger, SR No.39192 & 39191

+ 4 ccs to Mr. R. Natarajan, Advocate, on payment of Charger, SR No.39218

+ 1 cc to Mr. Sathish Parasaran, Advocate, on payment of Charger, SR No.39183

+ 2 ccs to the Government Pleader, SR Nos. 39394 & 39395

judgment
in
W.P. Nos.20212 & 20213,
20259, 20346, 20266,
21026 of 2007

SR/2.7.2007

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